No. 359

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

ALBERT E. GRAY,
Plaintiff in Error,

vs.

S. PRENTISS SMITH, FRANK MILLER and WILLIAM HARRINGTON,
Defendants in Error.

BRIEF OF DEFENDANTS IN ERROR.

S. C. DENSON,
Counsel for Defendants in Error.

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Defendants in Error.

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Statement of the Case.

The action is one at law to recover damages against the executors of Edgar Mills, deceased, for an alleged refusal of the decedent to comply with the terms of an agreement for an exchange of lands. The agreement, consisting of a written proposal upon the part of Edgar Mills addressed to the plaintiff under date of September 16, 1891, and its acceptance in writing by the plaintiff on October 7, 1891, is set out in full in the complaint, and the making of the agreement as thus alleged is not denied by the answer.

The contract alleged is in substance one upon the part of the decedent Mills to give, in exchange for a certain lot situate on Market street in the city of San Francisco, $120,000 in cash and certain described lands of his situate in Colusa and Tehama counties. The contract will be found set out in full in the findings of the court, numbered 1, 2 and 3, commencing on page 27 of the printed transcript.

It is not alleged in the complaint that the plaintiff performed or offered to perform the contract on his part, but it is alleged: "that the plaintiff was able, ready and willing from October 7, 1891, to and until November 18, 1891, to sell and convey to said Edgar Mills said Market street lot by a good and sufficient deed conveying to the said Edgar Mills a perfect title to said lot, but on said November 18, 1891, said Edgar Mills refused to buy said lot or to accept a conveyance thereof, and refused to comply with or carry out his said agreement to buy said lot as aforesaid on the ground and for the reason that the title thereto was imperfect." (Transcript, page 8). The answer of the defendants denies that the plaintiff was able, ready or willing to sell or convey the property agreed to be sold by him, or that said Mills at any time refused to carry out his part of said alleged contract of sale or purchase, either in whole or in part, or that he refused to purchase the property so agreed by him to be purchased or to accept a conveyance thereof made or tendered under or by reason of or in performance of said alleged

contract of sale and purchase (transcript, page 20).

The Findings.

The Court does not find specifically that Mills ever refused to carry out his agreement with plaintiff, or that plaintiff at any time ever gave him notice that he was ready and willing to make a conveyance of the Market street property in accordance with the terms of the agreement alleged in the complaint.

The Court finds that the plaintiff was never the owner of the property which, under the agreement, he contracted to convey to the decedent Mills, but that one Donahoe was such owner, a fact of which defendants' testator was not informed until after the making of the contract alleged in the complaint (transcript, page 37; finding no. 6), and that plaintiff never at any time had any contract with the owner by which he could secure the title to such property (see finding number 9, transcript page 36); but the Court does find that one Cavanagh, who was interested with plaintiff in making the exchange of the properties contemplated by the agreement set out in the complaint, endeavored to enter into a contract with its owner for the purchase of the Market street property, but that said owner, not knowing anything of the resources or responsibility of the said Cavanagh, refused to enter into any contract with him, but did, upon being informed by said Cavanagh that he desired to make the purchase for the decedent Mills, give to said Cavanagh a written offer in

these words: "San Francisco, October 7, 1891. I hereby agree to sell my lot, 82 6-12 feet on south side of Market street, immediately east and adjoining the Central Park, between Seventh and Eighth streets, and running through to Stevenson street in the rear, to Edgar Mills for one hundred and sixty-five thousand dollars, U. S. gold coin ($165,000), payable on delivery of deed after examination of title, say fifteen days from date. The purchaser to pay half of the taxes for the current year." (See finding number 6; transcript, page 34). The Court further found that decedent Mills rejected said offer (see finding number 6; transcript, page 36), and it may be inferred from finding number 12 (commencing transcript page 38) that Mills rejected the foregoing offer because he was advised that there was a defect in the title to the Market street lot. The Court further finds (see finding number 11; Transcript, page 37) that "Plaintiff never paid or offered to pay to said Joseph A. Donohoe, senior, the purchase price demanded by the said Donohoe for the said Market street lot, and did not at any time have the means or ability to pay the said Donohoe the purchase price demanded by him for the said Market street lot, and plaintiff never took any steps to procure for the said Edgar Mills the title to the said Market street lot other than by procuring the written offer of said Donohoe, dated October 7, 1891, which offer is fully set out in finding number 6.

Upon these findings and others not necessary to re-

fer to the Court found as a conclusion of law "that said plaintiff was never at any time able or ready to convey or cause to be conveyed to the said Edgar Mills the said Market street lot according to the terms of the contract set out in the complaint," and thereupon directed a judgment for the defendants.

The opinion of the Circuit Court is reported in 76 Federal Reporter, page 525.

The Question for Decision and Points and Authorities for Defendants in Error.

It is claimed by the plaintiff in error that the finding of the Court above quoted to the effect that plaintiff did not have the means or ability to pay the purchase price demanded by its owner for the Market street lot is not sustained by the evidence. In view of the other findings we do not think the finding so excepted to is essential to the maintenance of the judgment of the Circuit Court, but still we contend that the state of the evidence was such as to warrant this finding of the Court. We shall contend for the following propositions:

I.

Under the findings of the Court not excepted to, the plaintiff was not at any time the legal or equitable owner of the Market street lot which, under the contract alleged in the complaint, he contracted to convey to the defendants' testator; nor was the owner of such lot willing, upon the request of plaintiff, to convey the

same to said testator upon the terms of the contract alleged in the complaint. Upon this state of facts the conclusion of the Circuit Court "that said plaintiff was never at any time ready or able to convey or cause to be conveyed to the said Edgar Mills the said Market street lot according to the terms of the contract set out in the complaint" is a correct statement of the law and will be found to be sustained by the following authorities:

Eddy vs. Davis, 116 N. Y., 247.
Biggler vs. Morgan, 77 N. Y., 318.
Lawrence vs. Miller, 86 N. Y., 137.
Brown vs. Davis, 138 Mass., 458.

and other cases which will be cited in other portions of this brief for the purpose of illustrating this point.

II.

The Court was justified in finding that plaintiff did not have the pecuniary ability to secure the title to the lot which he contracted to convey, and the plaintiff, having failed to show that he was possessed of means to secure the title to such property upon the only terms upon which its owner would agree to part with such title, he failed to show in this respect also that he was able and ready to comply with his contract to make such conveyance to defendants' testator.

Grandy vs. Macrease, 2 Jones, N. C., 142.
Grandy vs. Small, 5 Jones, N. C., 55.
McGee vs. Hill, 4 Porter, 107.

Argument in Support of the Foregoing Propositions.

1. It is clear that upon the facts found by the Court the plaintiff was never at any time the legal nor the equitable owner of the land which he contracted to convey, and that defendants' testator was not informed of this fact until after the making of the contract set out in the complaint. It is clear also that the property was not in any manner under the control or direction of the plaintiff and that its owner was not willing to convey it to the defendants' testator upon the terms upon which plaintiff had contracted to convey it and for the purpose of carrying out that agreement on the part of the plaintiff. Under these circumstances we say that plaintiff failed to show an ability and readiness to perform the contract on his part. In asserting this proposition we do not, as was supposed by the learned Circuit Judge, run counter to the rule declared in Easton vs. Montgomery, 90 Cal., 307. In that case it was held, and we think rightly, that it is not necessary to the validity of a contract that the vendor should be the absolute owner of the property at the time he enters into an agreement of its sale. The Court there said: "An equitable estate in land or a right to become the owner of the land is as much the subject of sale as the land itself, and whenever one is so situated with reference to a tract of land that he can acquire the title thereto either by the voluntary act of the parties holding the title, or by proceedings at law or in equity, he is in a position to make a valid agreement for the

sale thereof. * * * * If the agreement is made by him in good faith and he has at the time such an interest in the land or is so situated with reference thereto that he can carry into effect the agreement on his part at the time he has agreed so to do, it will be upheld."

We do not dispute this proposition. The question here is not whether an equitable owner of land, who contracts to convey it, can recover damages for the breach of such a contract if he himself was able to perform it, but whether the plaintiff here, having entered into a contract to convey land of which he was neither the legal nor equitable owner—either then or subsequently—can maintain an action for an alleged breach of such contract; in other words, whether such a vendor is damaged by the refusal of the vendee under such contract to perform it on his part.

"A vendor of real estate has two remedies for the breach of a contract. He may insist upon its specific performance or he may maintain an action at law for damages. In an action at law for damages "the vendor must be held strictly to the very terms of his engagement, and show the performance of all the conditions on his part necessary to be performed to put the other part in default" (Smythe vs. Sturges, 108 N. Y., 503). An action for specific performance may be maintained without a previous tender; it is sufficient if the plaintiff offers in his complaint to perform, and is able to do so at the time of the trial. But when the vendor himself does not ask for the performance of the contract accord-

ing to its terms—does not ask to be placed in the exact condition where he would be upon the performance of the contract, but instead goes into a court of law demanding damages for its alleged breach by the vendee, in such case it is incumbent upon him to show a strict compliance with the contract on his part and to show a formal and technical default by the vendee. And this can only be done by proof that the vendor was at the time of the alleged breach able and ready to comply with the contract on his part. "The distinction between an action for specific performance in equity," said the Court in Bruce vs. Tilson, 25 N. Y., 197, "and a suit at law for damages for non-performance is this: that in the latter the right of action accrues out of the breach of the contract and a breach must exist before the commencement of the action, while in the former the contract itself and not the breach of it gives the action."

And certainly before the plaintiff here can be entitled to recover damages by reason of his vendee's refusal to take and pay for the land which plaintiff agreed to convey, the plaintiff must show that he was the owner of such land, or at least in such a situation in regard to it that he could cause the conveyance to be made on the exact terms of his contract. The rule applicable to a case like this is concisely stated by Wilde, C. J., in Dogood vs. Rose, 67 Eng. Common Law Reports, page 137, as follows: "It seems to me that the acts to be done by the plaintiff on the one side and by the de-

fendant on the other were to be contemporaneous; *and that before the plaintiff complains of the non-performance of the contract by the plaintiff he should have put himself in a condition to ask performance by being prepared to deliver what the defendant was entitled to receive.* This performance on the part of the plaintiff may be dispensed with or discharged by a notice from the defendant that he does not mean to execute the contract on his part. Now, what must the plaintiff in such a case aver? He must, I apprehend, at least aver that he was ready and willing to execute the deed and that the defendant had notice of his readiness and willingness."

The refusal or inability of the vendee to perform is not sufficient of itself to give a cause of action to the vendor. The vendor must also have been at the time of such refusal, or when performance on his part is due, able and ready to perform. This is the way the rule is stated in Biggler vs. Morgan, 77 N. Y., 388: "To entitle him to recover damages for a breach of the contract he must show that he was ready and willing to deliver such a deed as the contract called for. The refusal of the defendant to perform, although it obviated the necessity for the formal tender of a deed, did not dispense with the necessity of showing that the plaintiff was able, ready and willing to perform, and ordinarily this requires that the deed called for by the contract should be prepared and ready for delivery. * * * Morange vs. Morris, 32 Howard Practice, 178, and 3

Keyes, 50, is cited as an authority for the proposition that in an action like this the refusal or admitted inability of one party to a contract of this description to perform dispenses not only with an actual tender of performance by the other party but with proof of his readiness to perform. That case is not an authority for any such proposition. It was not an action to enforce the contract or for damages for its breach, but to recover back a payment made on account of the purchase money on the ground that the vendor, not being ready at the time appointed to convey good title, the vendee had exercised his right to rescind and reclaimed what he had paid. The cases are widely different and depend upon different principles. A contract for the purchase or exchange of lands may be rescinded, and the purchase money paid in advance may be recovered back on the failure of one party to perform, even though the other party could not have performed. If in this case neither of the parties had had title to the property which he had agreed to convey the contract could have been rescinded and any payments made upon it could have been recovered back, *but neither could have recovered from the other damages for its breach.* In an action to rescind and recover back payments it is enough to show a breach by the party who has received the money (Florence vs. , 5 Hill, 115), but not so when the action is to enforce the contract or recover damages. However positively a vendee may have refused to perform his contract, and

however insufficient the reason assigned for his refusal, he cannot be subjected to damages without showing that he would have received what he contracted for had he performed."

There being no doubt about this general principle of law, that no one can recover damages for the breach of a contract without showing that he was himself able and ready to perform at the time of such alleged breach we are brought to a consideration of the question as to what constitutes ability and readiness on the part of a vendor to convey land. Can he be said to be thus able without showing that he has the legal title, or at least has such legal title subject to his personal control and ready to be passed to the vendee upon the exact terms of the contract of purchase? In our judgment this question must be answered in the negative. Ability and readiness to perform signify *ex vi termini* a present ability. When used with reference to a vendor's agreement to convey land these words necessarily imply the possession of a title which can be exhibited as a record title and one which is apparently perfect when exhibited and which the vendor is then ready to convey or cause to be conveyed to the vendee. A vendor who has agreed to convey the legal title cannot maintain an action for breach of such contract without showing that he had the ability to vest such legal title in the vendee at the time of the alleged breach. We are not now speaking of the validity of a contract made by a vendor at a time when he has no title to lands and of

his right to enforce the same when he subsequently acquires the title, but we allude to what the vendor must show in relation to his title before he can maintain an action at law for damages against a vendee. In such an action, as we have seen, the vendor is held to a strict performance of his contract. He must show with great strictness his ability and readiness, and the vendee must have notice of such ability and readiness before he can be placed in technical default. We do not think, in such an action, it would be sufficient for the vendor to simply prove that he had an equitable title which might be turned into a perfect legal title by the ordinary course of equity; and *a fortiori* he would fall far short of maintaining his case if he proved no more than that the real owner was willing and ready to convey to him such land, but that he had not entered into any contract with him which entitled him to purchase and acquire title to the same and therefore that he did not have even an equitable title. Indeed, it may be safely asserted that a vendor cannot recover damages at law for an alleged breach of contract by the vendee when, upon the same facts a court of equity would not decree a specific performance if the vendor were in that court asking for such relief. The facts required to be shown are precisely the same in the two cases except that in the equitable action it is sufficient for the plaintiff to show his ability to comply with the decree of the Court at the time of the trial, while in the action at law such ability and readiness must be shown to have ex-

isted at the time of the alleged breach. It would be a singular rule of law that would permit a vendor who never at any time had such a title to the land he contracted to convey as would entitle him to ask for a specific performance of the contract in a court of equity, to recover in a court of law damages for non-performance of such contract by the vendee.

Ability and readiness to perform have reference to a present condition and not to a condition which may or would result from some future contract if it should be brought into existence. The case of Brown vs. Davis, 138 Mass., was an action for breach of a contract to convey lands, by the terms of which contract the plaintiff was to make payment within four months of its date. At the time of the contract the defendant, who was executor of an estate, was not able to convey the title, as he had not then obtained a license from the Probate Court to sell. It was shown upon the trial that plaintiff, within the four months named in the contract, made arrangements with one Richards for a loan of the sum of money necessary to enable him to perform his part of the contract; that Richards agreed to make such loan provided the defendant could give the plaintiff a good title to the premises, and thereupon, within the life of the contract, the plaintiff informed the defendant that he could get the necessary amount of money from Richards if the defendant could give him a good title. No formal tender was ever made by the plaintiff to the defendant, and upon the

expiration of the four months fixed in the contract the defendant sold the land to another person. The Supreme Court held upon these facts that the plaintiff was not entitled to maintain the action, and said: "There was no time when the plaintiff had prepared himself to perform presently his part of the contract. Neither party took sufficient steps to hold the other. It is no doubt true that an actual tender of the money by the plaintiff was not necessary, but he must show that he was ready, willing and able to do his part and that the defendant had notice thereof. Nothing short of this would put the defendant in legal default. The maxim that the law does not compel one to do vain and useless things does not apply to a case like this. Here both parties remained inactive in the eye of the law. What the plaintiff did by way of arranging for the money was merely preliminary and was quire insufficient to give him a right of action."

It will be observed that in the case just referred to the plaintiff had actually made arrangements by which he could have obtained the money necessary to carry out his contract, provided the defendant could give him a good title, and the defendant was notified of such fact, and yet the Court, speaking with reference to these specific facts, said: "There was no time when the plaintiff had prepared himself to perform presently his part of the contract. * * * * What plaintiff did by way of arranging for the money was merely prelim-

inary, and was quite insufficient to give him a right of action."

In the case of Eddy vs. Davis, 116 N. Y., 247, the plaintiff had contracted to convey certain property to the defendant, and as part of such contract agreed to keep open a right of way back of the property which he had contracted to sell. At the time of this agreement the plaintiff owned property over which he could have given such right of way, but he afterwards sold the same without any reservation of a right of way to the land which he had agreed to sell to the defendant, and at the time of the commencement of the action owned no property over which he could give such a right of way. The action was brought to recover an installment of the purchase money, and the Court found that the plaintiff had never tendered a deed to the defendant, but that the defendant had waived such tender, and no tender was necessary because "immediately before the commencement of this action the plaintiff's attorneys applied to said defendant and informed him that the plaintiffs were ready and willing to perform said contract on their part if he was ready to pay; to which defendant answered that he could not pay, and said that he wanted to give up the property." Upon this state of facts the Court of Appeals said: "It is undisputed that within two months after the defendant entered into possession of the property plaintiffs sold all their adjoining land, and thus put it out of their power to comply with their agreement with defendant, and keep

open a right of way to the rear of his store; and at the time of the offer mentioned in the finding of fact I have quoted, the plaintiffs were powerless to fulfill their engagement. The finding, therefore, that they were ready to perform, or that their offer and defendant's refusal constituted a waiver of tender of the deed cannot be sustained. A tender imports not only readiness and ability to perform, but actual production of the thing to be delivered. The formal requisite of a tender may be waived, but to establish a waiver there must be existing capacity to perform." (Nelson vs. Plimpton Elevating Co., 55 N. Y., 484; Lawrence vs. Miller, 86 id. 137; Bigler vs. Morgan, 77 id. 318).

The case from which we have just quoted is a direct authority to sustain the proposition that a vendor, who has agreed to convey a legal title to property, but who does not in fact have such title, cannot maintain an action upon the contract upon the refusal of the vendee to perform. That case was a much stronger one in favor of the vendor than the case presented here for the plaintiff. In that case the vendee announced that he could not pay for the property, and that he wished to give it up, while here there is no express finding by the Court that defendants' testator ever refused to carry out the contract alleged in the complaint, but only that he rejected an offer to purchase the property from the owner upon terms different from those upon which the plaintiff had agreed to make such conveyance to him. But assuming that he did refuse, the case just quoted

from is an authority for our contention that the plaintiff, not being the owner of the property he contracted to convey, cannot maintain this action.

That a vendor who is not the owner, either legal or equitable of the property which he has agreed to convey cannot enforce such contract, is also shown by that class of cases which hold that a vendee, upon discovery that his vendor has no title, may at once rescind the contract and recover back any payment that he has made thereunder. This is the rule declared in Goetz vs. Walters, 34 Minnesota, page 239, and which case is approved by the Supreme Court of California in Burks vs. Davies, 85 Cal. 110. The case of Goetz vs. Walters was an action by a vendee to recover money paid to a vendor on an agreement for the purchase of a house and lot, the plaintiff alleging that the defendant was not the owner of the premises agreed to be conveyed. The answer alleged that the plaintiff had repudiated and expressly refused to be bound by the agreement before the commencement of the action, and alleged that since the commencement of the action the defendant had acquired title to the premises, and was then ready and willing to perform. The Court held that the plaintiff was entitled to a judgment on the pleadings. The Court in that case say: "He (the vendor) was bound to be prepared at all times to convey a good title, and whenever within that time she should ascertain that he had no title so that it was impossible for him to make a conveyance, she could at once avoid the

contract without going to the useless trouble of tendering payment and calling on him to convey. The answer admits that she did so on May 15th, and thereupon it was the duty of the defendant to repay to her the $300."

In Burks vs. Davies, 85 Cal., 110, an action by a vendee to recover money paid on a contract, the Court say, quoting from Sugden on Vendors: "Where a person sells an interest, and it appears that the interest which he pretends to sell was not the true one * * * the purchaser may consider the contract at an end, and bring an action for money had and received to recover any sum of money which he may have paid in part performance of the agreement of sale." And the Court in that case further said: "Under a contract for the sale of real estate the vendee is regarded as the equitable owner, and the vendee a trustee of the legal estate for him. If the vendor has no title to the property the vendee is entitled to a rescission." It is true the Court in the present case finds that there was no rescission or abandonment of the contract; but it needs no argument to show that upon facts which entitle the vendee to rescission the vendee cannot be subjected to damages for a refusal to perform; and notwithstanding the finding of the learned Judge of the Circuit Court, we may be permitted to say that if the defendants' testator ever did refuse to perform this contract, it was in legal effect a rescission on his part. One who has a right to rescind a contract and recover back all that he may

have paid thereunder must necessarily have the right to refuse to perform the contract, without subjecting himself to the payment of damages, and such a refusal would amount to a rescission. To sum up the argument on this point, the findings show that the plaintiff was never at any time the legal or equitable owner of the land which he contracted to convey; and that defendants' testator first learned that plaintiff was not the owner of such land after entering into the contract set out in this complaint; and further, that the real owner of such land would only convey it to the defendants' testator upon terms materially different from those upon which the plaintiff had agreed to make the conveyance. The findings further show that the real owner was not willing to make a contract with any other person than the defendants' testator for the sale of such land, so that in effect the only means by which said Mills could obtain the title to said property was by entering into a new and different contract with its owner. The Court finds that Mills refused to enter into this new contract. Such refusal does not constitute a refusal to carry out the contract alleged in the complaint; and although we may be morally certain that he would have refused to accept a conveyance from the plaintiff even if tendered to him upon the terms of the agreement set out in the complaint, still the refusal actally made did not constitute a breach of his contract with plaintiff, nor relieve plaintiff of his obligation, if he desired to recover damages for its alleged breach, to

be able to perform it on his part. Without such ability and readiness on his part it was not possible for him to put Mills in technical default.

II.

The plaintiff in error excepts to the finding of the Court to the effect that he did not at any time have the means or ability to pay the purchase price demanded by its owner for the Market street lot, and claims here that such finding is not sustained by the evidence. If the proposition already discussed by us is sustained it will be at once seen that the question whether the finding referred to is or is not sustained by the evidence is immaterial. We think, however, that in any possible view of the case, since the owner of the lot refused to convey it except upon the payment of $165,000 in cash it was incumbent upon the plaintiff to show that he was in a position to acquire such title upon the only terms upon which its owner would make the conveyance. There is no presumption of law, independent of proof, that he would have been able to acquire this title even if defendants' testator had signified his willingness to accept the same. Therefore, it was necessary for the plaintiff to prove the fact if it was material; and the bill of exceptions showing that the plaintiff failed to introduce any evidence whatever upon this point the Court was justified in finding the fact against the present contention of the plaintiff. The rule is, if no evidence or no sufficient evidence be introduced in rela-

tion to any fact, the finding should be against the party upon whom was the burden of proving such fact. (Levingston vs. Ryan, 75 Cal., 293).

That the burden of proof was upon plaintiff to show that he was in a position to acquire the title to the lot he contracted to convey we think clear, and when it is conceded that he could not acquire this title without the payment of $165,000 in cash it necessarily follows it was incumbent upon him to show that he was possessed of means of his own sufficient to make such payment or was able to secure a sufficient loan for that purpose. And it is equally clear under the authorities that the plaintiff is required to show that he possessed this ability independent of performance upon the part of Mills (McGee vs. Hill, 4 Porter, 170), in which case the Court said: "It is a well settled rule of law that when a contract is dependent, as where one agrees to sell and deliver and the other agrees to pay on delivery, in an action for non-delivery it is necessary for the plaintiff to prove a readiness to pay on his part whether the other party was ready at the place to deliver or not. * * * * The instructions of the Court, therefore, that if the jury believed that the credit which the corn and fodder when delivered might give, together with the other means of the plaintiff, would have enabled him to raise the money so as to have been prepared to pay, that would be sufficient evidence of readiness was erroneous."

So, also, in Mount vs. Lion, 49 N. Y., 552, in which

case the plaintiff sued for breach of contract to sell and deliver brick, the Court said: "It was not necessary that the plaintiff should have during the whole of the three months or on any day during that time a sum of money in hand sufficient to pay for the whole quantity of brick called for by the contract. It was sufficient that he had the means and resources at his command which would have enabled him to pay had the brick been delivered."

So, also, in Bronson vs. Wiman, 4 Selden, 188, an action for breach of a contract for the sale and delivery of flour. The Court say: "The plaintiffs were under no obligation to prove payment or a tender of payment. It was enough that they were ready at the time and place appointed for the performance of the contract to receive and pay for the flour. * * * Wing was apprised of the agreement and furnished with a copy, and he declared to his clerk that he was ready to pay for the flour if it arrived; and in confirmation of this declaration it was shown that he paid promptly all demands against him and that he had facilities for raising money to an amount sufficient to pay for 2000 barrels of flour. This evidence was abundantly sufficient to take this question to the jury and authorize a finding in behalf of the plaintiffs."

We do not understand that the case of Stokes vs. Mackay, 147 N. Y., is authority for the proposition that the burden of proof was upon the defendants in this case to show that plaintiff did not have sufficient funds

to purchase the Market street lot. That was an action to recover the balance due upon the purchase price of certain bonds and stocks, the greater portion of which had been delivered to defendant under the contract and retained by him. It appeared upon the trial that after the repudiation of the contract by the defendant the plaintiff had pledged a portion of the stock and bonds agreed to be sold, and the Court held that under the pleadings it was not incumbent upon the plaintiff to show that his finances were in such condition that he could redeem the bonds at the time of the trial. The Court said: "It is very clear under the circumstances disclosed, if at all essential, that it was incumbent upon the defendants to make out the fact, which they wholly fail to establish, that the plaintiff was incapable of redeeming the bonds for delivery." The Court further said: "Under the allegations of the complaint the defendants might at any time after the action was commenced, have demanded the bonds yet undelivered upon offering to pay the $75,000 claimed from them. If their delivery had become impossible to the plaintiffs the defendants would have had the right to compel him to account for all he could not deliver, but nothing which could happen to the bonds after the right of action had vested and was availed of could divest such right of action. That some of the bonds remained pledged to others to secure liabilities of the plaintiff proves nothing against his right of recovery. If he could not redeem them he could be compelled to

account for the moneys received for them. If any had been converted or passed beyond his control after the commencement of the action and without default on his part, at most if at all, under the circumstances, he could be compelled to account for their actual value. * * * The defendants have at all times been entitled upon offering to pay the $75,000 to have the bonds. Their payment of this judgment will leave them still entitled to demand them, and a failure to deliver them will create a cause of action in their favor for their value."

The Court will see from the foregoing quotation that the question discussed in Stokes vs. Mackey is widely different from that which is presented by the case at bar.

But in addition to the fact that plaintiff failed to introduce any evidence tending to show his ability to acquire the title to the Market street property independent of the performance by Mills of the contract alleged in the complaint his counsel virtually conceded upon the trial of the action in the Circuit Court, that plaintiff was without such ability, and in their printed argument addressed to the Court used this language: "Upon this payment and conveyance by Mills to Gray depended Gray's ability to produce Donohue's deed—depended so utterly and wholly that Mills' refusal to go amounted to an absolute prevention of Gray's performance. Every fact in the case points to the moral conviction that if Mills had lived up to his

contract by paying his $120,000, and conveying to Gray the country lands, Gray would have been abundantly able to carry out his part of the contract. Herein lay Gray's ability—in the anxious readiness of Donohue to live up to his engagement, in the fact that Mills' land and money which, under the contract, belonged equitable and potentially to Gray, would have enabled him to pay Donohue and procure the deed. * * * Morally we know that if Mills had not retired the transaction would have gone smoothly through, and that Mills' conduct was the sole cause of its defeat. Morally we know that Gray could not fulfill his engagement unless Mills on his part fulfilled the obligations arising from his acceptance of the benefits of the transaction and his knowledge of the facts." Transcript page 47.

Having thus conceded the fact of plaintiff's inability to procure the money with which to acquire the title to the land which he had agreed to convey independently of performance upon the part of defendants' testator, the plaintiff in error has no legal ground of exception to the finding of the Court in accordance with such admission. In other words, even if it should be held that the burden of proof was on defendants to show that plaintiff did not have the pecuniary ability to purchase the Market street lot, the Court was justified in assuming as against the plaintiff the truth of his counsel's admissions.

Conclusion.

We think upon the record this judgment must be affirmed. It would be singular, indeed, if one who has contracted to sell land which he does not own, and to which he does not have even the shadow of an equitable title, and who is further without pecuniary ability to acquire such title, could recover damages against his vendee for breach of such contract simply because the vendee, in considering an offer made to him by the real owner, refuses to enter into such new contract, although he may give as a ground for such refusal that he does not consider the title to such property good. The contract set out in the complaint did not impose upon Mills the obligation to accept the subsequent offer made to him by the real owner of the property, and his rejection of it, no matter what reason he may have given for such rejection, was not a breach of the contract alleged in the complaint.

We respectfully submit that the judgment should be affirmed.

S. C. DENSON,

Counsel for Defendants in Error.